

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

Case No. 8:22-cv-01433-KKM-MRM

ECLIPSE SPORTSWIRE,

Plaintiff,

v.

THE SPORTS MALL, LLC d/b/a
SPORTSCOLLECTIBLES.COM

Defendant.

FIRST AMENDED COMPLAINT

Plaintiff Eclipse Sportswire (“Plaintiff”) sues defendant The Sports Mall, LLC d/b/a SportsCollectibles.com (“Defendant”), and alleges as follows:

THE PARTIES

1. Plaintiff is an unincorporated business organized and existing under the laws of the State of Maryland with its principal place of business located in Coloma, MD.

2. Defendant is a limited liability company organized and existing under the laws of the State of Florida with its principal place of business located at 4710 Eisenhower Blvd S., Suite A-1, Tampa, FL 33634. Defendant’s agent for service of process is Synergy Ventures, Inc., 4710 Eisenhower Blvd S. Suite A-1, Tampa, FL 33634.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

4. This Court has personal jurisdiction over Defendant because it has maintained sufficient minimum contacts with Florida such that the exercise of personal jurisdiction over it

would not offend traditional notices of fair play and substantial justice.

5. Venue properly lies in this district pursuant to 28 U.S.C. § 1400(a) because Defendants or its agents reside or may be found in this district. “A defendant ‘may be found’ in a district in which he could be served with process; that is, in a district which may assert personal jurisdiction over the defendant.” Palmer v. Braun, 376 F.3d 1254, 1259-60 (11th Cir. 2004). “In other words, ‘if a court has personal jurisdiction over the defendants in a copyright infringement action, venue in that court’s district is proper.’” McGregor v. In Tune Music Grp., No. 15-62044-CIV-ZLOCH, 2016 U.S. Dist. LEXIS 190302, at *11 (S.D. Fla. July 29, 2016) (quoting Store Decor Div. of Jas Int’l, Inc. v. Stylex Worldwide Indus., Ltd., 767 F. Supp. 181, 185 (N.D. Ill. 1991)).

FACTS

I. Plaintiff’s Business

6. Plaintiff is a wire service providing editorial photographic coverage for sporting events all over the world with a focus on horse racing, equestrian events, and golf.

7. Since 2009, Plaintiff has covered every major thoroughbred horse race and many major equestrian events in the United States such as the Rolex championships in Kentucky and Nevada. Images from photographers working on behalf of Plaintiff have appeared in Sport Illustrated, Chronicle of the Horse, Steeplechase Times, Stride Magazine, Trainer Magazine, CBSSport.com, Horse Racing Nation, The Downey Profile, Hello Race Fans, and many more.

II. The Work at Issue in this Lawsuit

8. Alex Evers is one of the many renowned photographers represented by Plaintiff.

9. Mr. Evers began photography as a hobby when he was 21 years old but has loved horse racing from a very early age. His hobby quickly became his profession and today he is a

renowned horse racing photographer as well as an accomplished sports and corporate photographer. Mr. Evers has over 9,000 images of intense racing moments, trainers, jockeys, horses and fans at Plaintiff's website (at <https://eclipsesportswire.photoshelter.com/>) covering major races around the world such as the Breeder's Cup, Kentucky Derby, Churchill Downs, The Belmont Stakes, The Longines International Races, and many more.

10. Mr. Evers' main goal in creating an image is to take something already seen before and show it in a tight and different perspective. He is devoted to making beautiful, storytelling images and his photography does indeed show the excitement, tension, beauty, and grittiness of the equestrian racing world.

A. The First Photograph

11. On May 02, 2015, Mr. Evers took a professional photograph of American Pharaoh with jockey Victor Espinoza defeating Firing Line and Gary Stevens to win the Kentucky Derby at Churchill Downs Louisville, KY titled "15-0502-American_Pharaoh_Firing_line_01_evers" (the "First Photograph"). A copy of the First Photograph is exhibited below:



12. The First Photograph was registered by Mr. Evers with the Register of Copyrights on July 04, 2015 and was assigned Registration No. VA 1-974-868. A true and correct copy of the Certification of Registration pertaining to the Work is attached hereto as **Exhibit “A.”**

13. Mr. Evers is the owner of the First Photograph and has remained the owner at all times material hereto.

B. The Second Photograph

14. On June 09, 2018, Mr. Evers took a professional photograph of Justify #1 with Mike Smith becoming the 13 Triple Crown champion after winning the 150 Belmont Stakes in Elmont, New York titled “18-0609-justify-113-Evers” (the “Second Photograph”). A copy of the Second Photograph is exhibited below:



15. The Second Photograph was registered by Mr. Evers with the Register of Copyrights on July 02, 2018 and was assigned Registration No. VA 2-109-184. A true and correct copy of the Certification of Registration pertaining to the Work is attached hereto as **Exhibit**

“B.”

16. Mr. Evers is the owner of the Second Photograph and has remained the owner at all times material hereto.

C. The Third Photograph

17. On January 28, 2017, Mr. Evers took a professional photograph of Arrogate #1, ridden by jockey Mike Smith, winning the Pegasus World Cup Invitational at Gulfstream Park Course in Hallandale Beach, FL titled “17-0128-Arrogate_002-Evers.jpg” (the “Third Photograph”). A copy of the Third Photograph is exhibited below:



18. The Third Photograph was registered by Mr. Evers with the Register of Copyrights on June 22, 2017 and was assigned Registration No. VA 2-056-091. A true and correct copy of the Certification of Registration pertaining to the Work is attached hereto as **Exhibit “C.”**

19. Mr. Evers is the owner of the Third Photograph and has remained the owner at all times material hereto.

D. The Fourth Photograph

20. On August 20, 2016, Mr. Evers took a professional photograph of California Chrome #1, ridden by jockey Victor Espinoza, winning the TVG Pacific Classic Stakes at Del Mar in Del Mar, California titled “EVS_160820-californiachrome_001.jpg” (the “Fourth Photograph”). A copy of the Fourth Photograph is exhibited below:



21. The Fourth Photograph was registered by Mr. Evers with the Register of Copyrights on September 8, 2016 and was assigned Registration No. VA 2-016-363. A true and correct copy of the Certification of Registration pertaining to the Work is attached hereto as **Exhibit “D.”**

22. Mr. Evers is the owner of the Fourth Photograph and has remained the owner at all times material hereto.

23. The First Photograph, Second Photograph, Third Photograph and Fourth Photograph are collectively referred to herein as the “Work.”

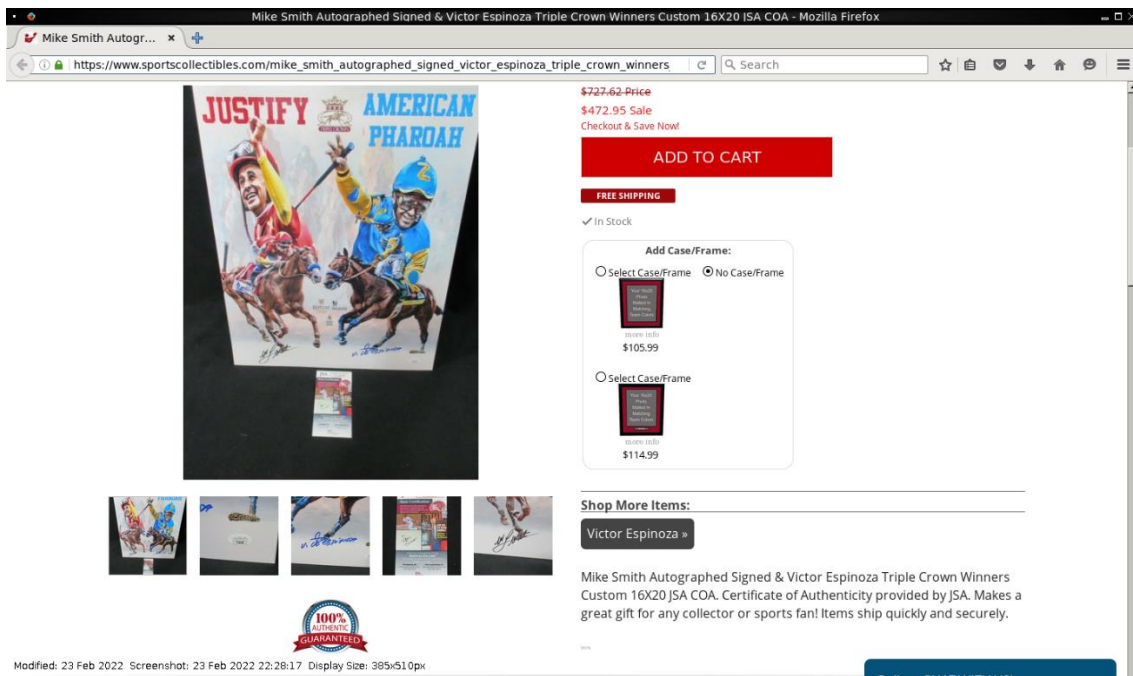
24. For all times relevant to this action, Plaintiff has been appointed as the exclusive administrator and publisher of all copyright rights in and to the Work. As such, Plaintiff is entitled to institute and maintain this action for copyright infringement. See 17 U.S.C. § 501(b).

III. Defendant's Unlawful Activities

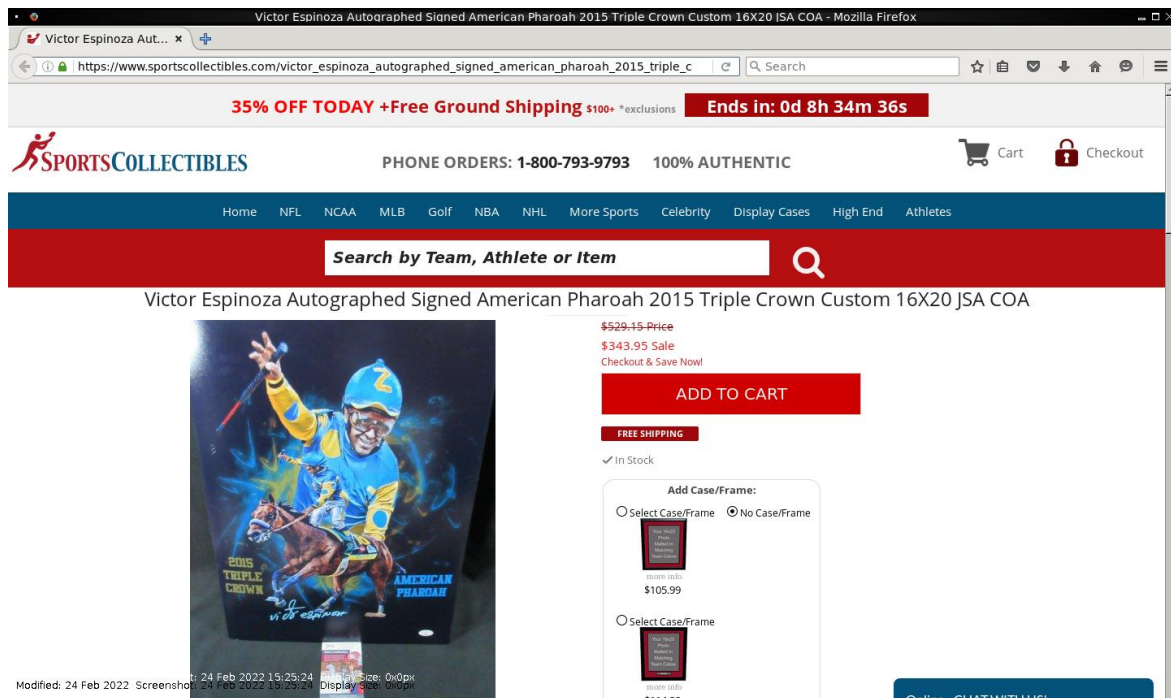
25. Defendant operates an online store that sells authentic sports memorabilia and sport collectibles. Its website offers over 35,000 items from almost every professional and college-level sport teams and athletes.

26. Defendant advertises/markets its business primarily through its website (<https://www.sportscollectibles.com>), social media (e.g. <https://www.facebook.com/SportsCollectiblesStore/>), and other forms of advertising.

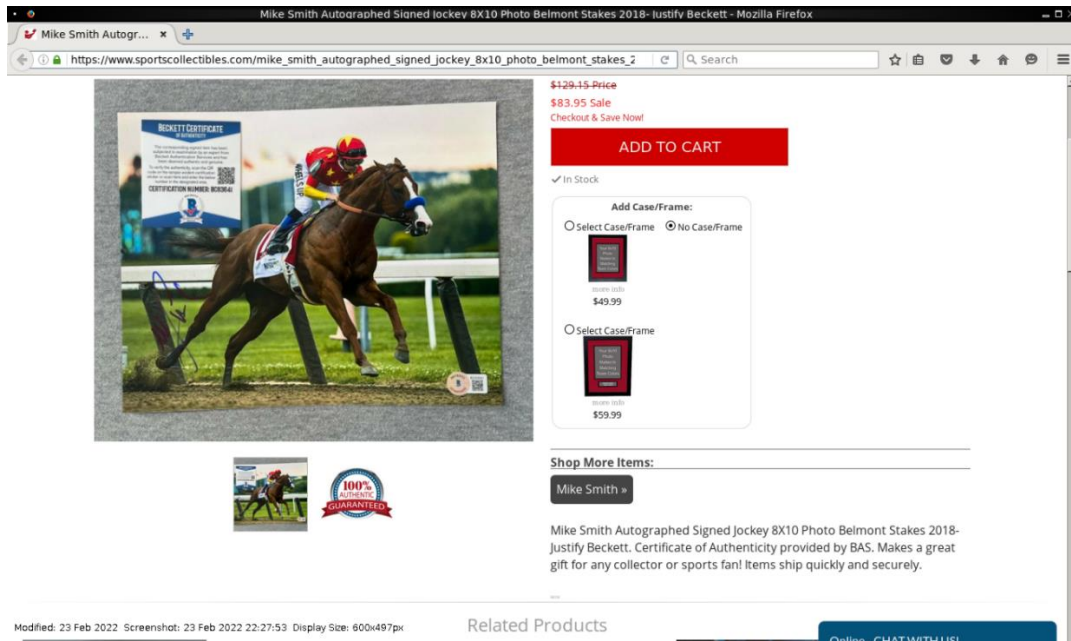
27. On a date after Mr. Evers' above-referenced copyright registration of the First Photograph, Defendant displayed the First Photograph (or a derivative copy thereof) on its website (at https://www.sportscollectibles.com/mike_smith_autographed_signed_victor_espinoza_triple_crown_winners_custom_16x20_jsa_coa_c_p12738429.htm) in connection with a "Mike Smith Autographed Signed & Victor Espinoza Triple Crown Winners Custom 16x20 JSA COA" that Defendant was attempting to sell for \$472.95:



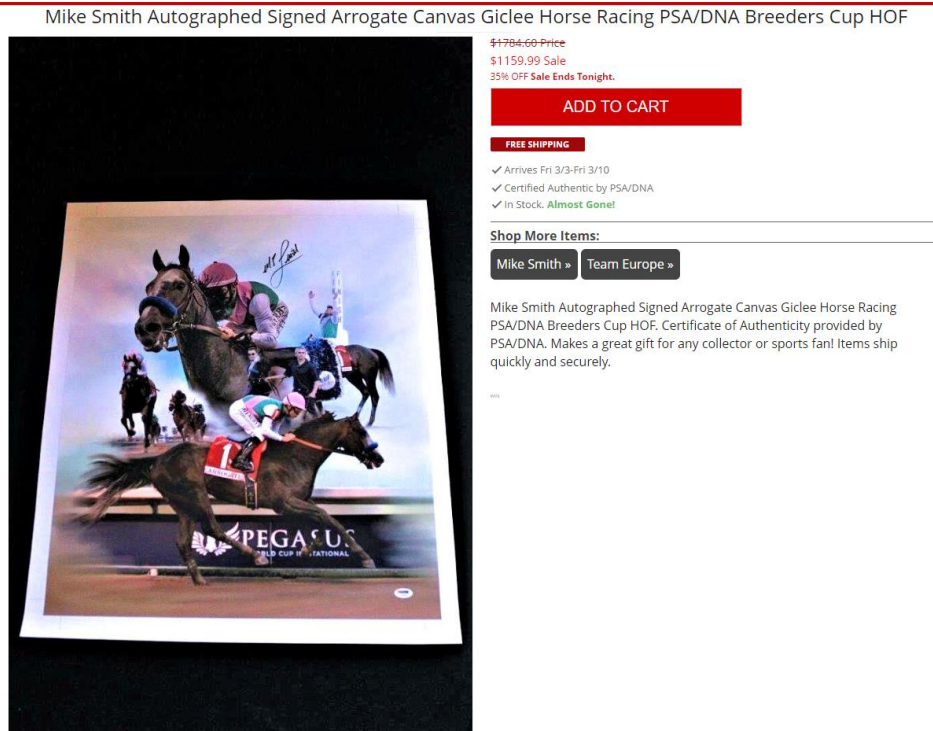
28. On a date after Mr. Evers' above-referenced copyright registration of the First Photograph, Defendant displayed the First Photograph (or a derivative copy thereof) on its website (at https://www.sportscollectibles.com/victor_espinoza_autographed_signed_american_pharoah_2015_triple_crown_custom_16x20_jsa_coa_c_p12729122.htm) in connection with a "Victor Espinoza Autographed Signed American Pharoah 2015 Triple Crown Custom 16x20 JSA COA" that Defendant was attempting to sell for \$343.95:



29. On a date after Mr. Evers' above-referenced copyright registration of the Second Photograph, Defendant displayed the Second Photograph on its website (at https://www.sportscollectibles.com/mike_smith_autographed_signed_jockey_8x10_photo_belmont_stakes_2018_justify_beckett_c_p12696305.htm) in connection with a "Mike Smith Autographed Signed Jockey 8x10 Photo Belmont Stakes 2018-Justify Beckett" that Defendant was attempting to sell for \$83.95:

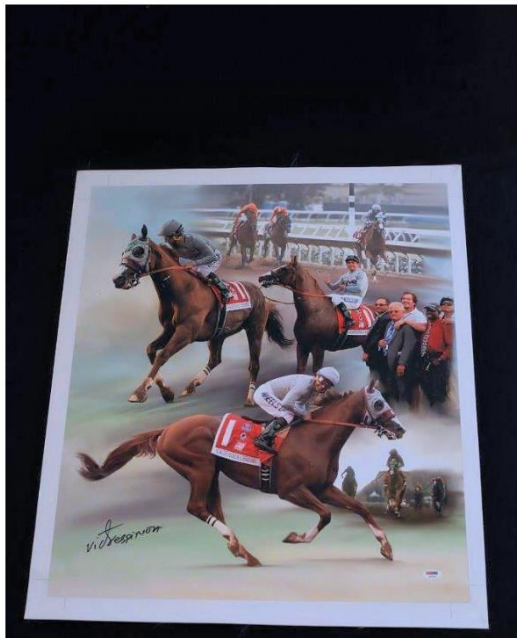


30. On a date after Mr. Evers' above-referenced copyright registration of the Third Photograph, Defendant displayed a giclée derivative copy of the Third Photograph on its website (at https://www.sportscollectibles.com/mike_smith_autographed_signed_arrogate_canvas_giclee_horse_racing_psa_dna_breeders_cup_hof_c_p20490541.htm) in connection with a "Mike Smith Autographed Signed Arrogate Canvas Giclee Horse Racing PSA/DNA Breeders Cup HOF" that Defendant was attempting to sell for \$1,159.99:



31. On a date after Mr. Evers' above-referenced copyright registration of the Fourth Photograph, Defendant displayed a giclée derivative copy of the Fourth Photograph on its website (at https://www.sportscollectibles.com/victor_espinoza_autographed_signed_california_chrome_canvas_giclee_horse_racing_psa_dna_c_p20543477.htm) in connection with a "Victor Espinoza Autographed Signed California Chrome Canvas Giclee Horse Racing PSA/DNA" that Defendant was attempting to sell for \$729.99:

Victor Espinoza Autographed Signed California Chrome Canvas Giclee Horse Racing PSA/DNA



~~\$1123.06 Price~~
 \$729.99 Sale
 35% OFF Sale Ends Tonight.

ADD TO CART

FREE SHIPPING

✓ Arrives Fri 3/3-Fri 3/10
 ✓ Certified Authentic by PSA/DNA
 ✓ In Stock: **Almost Gone!**

Shop More Items:

Victor Espinoza »

Team Europe »

Victor Espinoza Autographed Signed California Chrome Canvas Giclee Horse Racing PSA/DNA. Certificate of Authenticity provided by PSA/DNA. Makes a great gift for any collector or sports fan! Items ship quickly and securely.

32. A true and correct copy of screenshots of Defendant's website, displaying the copyrighted Work, is attached hereto as **Exhibit "E."**

33. Defendant is not and has never been licensed to use or display the Work. Defendant never contacted Plaintiff to seek permission to use the Work in connection with its website or for any other purpose.

34. Defendant utilized the Work for commercial use – namely, in connection with the sale of autographed sports memorabilia.

35. Upon information and belief, Defendant located a copy of the Work on the internet and, rather than contact Plaintiff to secure a license, simply copied the Work for its own commercial use.

36. Through its ongoing diligent efforts to identify unauthorized use of its photographs, Plaintiff first discovered Defendant's unauthorized use/display of the Work in February 2022. Following Plaintiff's discovery, Plaintiff notified Defendant in writing of such unauthorized use. To date, Plaintiff has been unable to negotiate a reasonable license for the past infringement of

its Work.

37. All conditions precedent to this action have been performed or have been waived.

COUNT I – COPYRIGHT INFRINGEMENT

38. Plaintiff re-alleges and incorporates paragraphs 1 through 37 as set forth above.

39. Each photograph comprising the Work is an original work of authorship, embodying copyrightable subject matter, that is subject to the full protection of the United States copyright laws (17 U.S.C. § 101 *et seq.*).

40. Mr. Evers owns a valid copyright in each photograph comprising the Work, having registered the Work with the Register of Copyrights.

41. Plaintiff has standing to bring this lawsuit and assert the claim(s) herein as it has sufficient rights, title, and interest to such copyright (as Plaintiff serves as the exclusive licensing agent with respect to the Work).

42. As a result of Plaintiff's reproduction, distribution, and public display of the Work, Defendant had access to the Work prior to its own reproduction, distribution, and public display of the Work on its website.

43. Defendant reproduced, distributed, and publicly displayed the Work without authorization from Plaintiff.

44. By its actions, Defendant infringed and violated Plaintiff's exclusive rights in violation of the Copyright Act, 17 U.S.C. § 501, by reproducing, distributing, and publicly displaying the Work for its own commercial purposes.

45. Defendant's infringement was willful as it acted with actual knowledge or reckless disregard for whether its conduct infringed upon Plaintiff's copyright. Notably, Defendant itself has a copyright disclaimer on its website (© 2022 Sports Collectibles), indicating that Defendant

understands the importance of copyright protection and intellectual property rights and is actually representing that it owns each of the photographs published on its website. See, e.g., Bell v. ROI Prop. Grp. Mgmt., LLC, No. 1:18-cv-00043-TWP-DLP, 2018 U.S. Dist. LEXIS 127717, at *3 (S.D. Ind. July 31, 2018) (“[T]he willfulness of ROI’s infringement is evidenced by the fact that at the bottom of the webpage on which the Indianapolis photograph was unlawfully published appeared the following: ‘Copyright © 2017.’ By placing a copyright mark at the bottom of its webpage that contained Mr. Bell’s copyrighted Indianapolis Photograph, Mr. Bell asserts ROI willfully infringed his copyright by claiming that it owned the copyright to everything on the webpage; John Perez Graphics & Design, LLC v. Green Tree Inv. Grp., Inc., Civil Action No. 3:12-cv-4194-M, 2013 U.S. Dist. LEXIS 61928, at *12-13 (N.D. Tex. May 1, 2013) (“Once on Defendant’s website, Defendant asserted ownership of Plaintiff’s Registered Work by including a copyright notice at the bottom of the page. Based on these allegations, the Court finds Plaintiff has sufficiently pled a willful violation....”). Defendant clearly understands that professional photography is not generally available for free or that such can simply be copied from the internet.

46. Defendant’s willfulness is further demonstrated by the fact that Defendant received multiple infringement notices and was sued multiple times for copyright infringement prior to Plaintiff’s discovery of the infringements at issue herein, yet Defendant has not implemented any policies or procedures to avoid infringement and has not materially altered its business practices to attempt to confirm that the products it sells are not protected by copyright. See, e.g., Fabric Selection, Inc. v. NNW Imp., Inc., No. 2:16-cv-08558-CAS(MRWx), 2018 U.S. Dist. LEXIS 62334, at *29 (C.D. Cal. Apr. 11, 2018) (“[R]ecklessness or willful blindness is typically demonstrated by past practices of infringing other works, or when a defendant ignores a warning letter sent by plaintiff’s counsel.”) (citing Nimmer on Copyright § 14.04[B][3][a], at 14-94-14-

95); Design Basics, LLC v. Drexel Bldg. Supply, Inc., No. 13-C-560, 2016 U.S. Dist. LEXIS 137713, at *17-18 (E.D. Wis. Oct. 4, 2016) (“If offered for the limited purpose of establishing willfulness, on the other hand, all that need be shown is that the Defendants have previously faced copyright infringement accusations. That is, the merit and truth of those accusations is less relevant than the fact that they were made at all. It is the accusation, combined with the settlement, that arguably placed the Defendants on notice that their actions were causing others to call their conduct into question—regardless of the merit of those questions.”); N.A.S. Imp., Corp. v. Chenson Enters., 968 F.2d 250, 252 (2d Cir. 1992) (“We have held that for the purpose of awarding enhanced statutory damages under § 504(c)(2), an infringement is willful if the defendant had knowledge that its actions constitute an infringement. This knowledge may be actual or constructive. In other words, it need not be proven directly but may be inferred from the defendant's conduct.”) (internal citations and quotation marks omitted); 4 Nimmer on Copyright § 14.04[B][3] (“[O]ne who ‘recklessly disregards’ a copyright holder’s rights, even if lacking actual knowledge of infringement, may be subject to enhanced damages. That reckless disregard can be inferred from a past practice of infringing other works or from other circumstances—a good example being that the defendant has defaulted.”); Yash Raj Films (USA) Inc. v. Rannade Corp., No. CIVIL: 01 CV 5779 (JCL), 2007 U.S. Dist. LEXIS 36086, at *28 (D.N.J. May 17, 2007) (“Defendants having been sued in other copyright infringement cases and Defendants' past practice of infringing other works is another basis for finding Defendants' infringement to be willful.”); Swallow Turn Music v. Wilson, 831 F. Supp. 575, 580 (E.D. Tex. 1993) (“It can be said that there are two kinds of willfulness: (1) knowing that a particular performance is a copyright infringement, and (2) knowing that the normal course of business involves a pattern of repeated copyright infringements. Should the latter situation occur, then ‘willfulness’ proven

as to the course of business will suffice for "willfulness" for any particular occurrence of copyright infringement. A proprietor who has been repeatedly warned that a course of conduct violates the law should take responsibility in seeing that it does not happen again.”).

47. These prior lawsuits include: (a) Kevorkian v. The Sports Mall, LLC, Case No., 2:21-cv-02747 (C.D. Cali.); Krikor et al. v. The Sports Mall, LLC, Case No. 2:22-cv-05600 (C.D. Cali.); and Boehm v. The Sports Mall, LLC, Case No. 1:21-cv-21977 (S.D. Fla.).

48. Defendant’s willfulness is further demonstrated by its continued infringement of Plaintiff’s professional photography throughout the course of this lawsuit. After being on notice of its infringement of the First Photograph and the Second Photograph, Defendant failed to take any action to stop infringing Plaintiff’s photographs. That inaction resulted in Defendant’s continued and/or post-lawsuit display of the Third Photograph, the Fourth Photograph, and at least one other photograph captured by Mr. Evers that is currently not registered with the U.S. Copyright Office (see https://web.archive.org/web/20230301020902/https://www.sportscollectibles.com/mike_smith_autographed_signed_arrogate_canvas_giclee_horse_racing_psa_dna_breeders_cup_c_p20516232.htm).

49. Plaintiff has been damaged as a direct and proximate result of Defendant’s infringement.

50. Plaintiff is entitled to recover its actual damages resulting from Defendant’s unauthorized use of the Work and, at Plaintiff’s election (pursuant to 17 U.S.C. § 504(b)), Plaintiff is entitled to recover damages based on a disgorgement of Defendant’s profits from infringement of the Work, which amounts shall be proven at trial.

51. Alternatively, and at Plaintiff’s election, Plaintiff is entitled to statutory damages

pursuant to 17 U.S.C. § 504(c), in such amount as deemed proper by the Court.

52. Pursuant to 17 U.S.C. § 505, Plaintiff is further entitled to recover its costs and attorneys' fees as a result of Defendant's conduct.

53. Defendant's conduct has caused and any continued infringing conduct will continue to cause irreparable injury to Plaintiff unless enjoined by the Court. Plaintiff has no adequate remedy at law. Pursuant to 17 U.S.C. § 502, Plaintiff is entitled to a permanent injunction prohibiting infringement of Plaintiff's exclusive rights under copyright law.

WHEREFORE, Plaintiff demands judgment against Defendant as follows:

- a. A declaration that Defendant has infringed Plaintiff's copyrights in the Work;
- b. A declaration that such infringement is willful;
- c. An award of actual damages and disgorgement of profits as the Court deems proper or, at Plaintiff's election, an award of statutory damages for willful infringement up to \$150,000.00 for each infringement of each photograph comprising the Work;
- d. Awarding Plaintiff its costs and reasonable attorneys' fees pursuant to 17 U.S.C. § 505;
- e. Awarding Plaintiff interest, including prejudgment interest, on the foregoing amounts;
- f. Permanently enjoining Defendant, its employees, agents, officers, directors, attorneys, successors, affiliates, subsidiaries and assigns, and all those in active concert and participation with Defendant, from directly or indirectly infringing Plaintiff's copyrights or continuing to display, transfer, advertise, reproduce, or otherwise market any works derived or copied from the Work or to participate or assist in any such activity; and
- g. For such other relief as the Court deems just and proper.

Demand For Jury Trial

Plaintiff demands a trial by jury on all issues so triable.

Dated: March 27, 2023.

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By: /s/ Daniel DeSouza
Daniel DeSouza, Esq.
Florida Bar No.: 19291
James D'Loughy, Esq.
Florida Bar No.: 005270

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will electronically serve all counsel of record.

/s/ Daniel DeSouza
Daniel DeSouza, Esq.